NO. 87-15

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term

Thomas H. Brown and Debra Brown,
Appellants,

vs.

Richard L. Bailey and Sarah Bailey,
Appellee.

On Appeal From the Court of Civil
Appeals of Alabama

REPLY BRIEF BY APPELLEES IN OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT

Annetta Z. Arnold
(Counsel of Record)
H. Evans Whaley
Vincent, Hasty, Arnold &
Whaley, P.C.
90 Bagby Drive, Suite 200
Birmingham, Alabama 35209
(205) 942-7649
Counsel for Appellees-Intervenors
J. Wynell Brooks
Public Defender
120 Second Court North
Birmingham, Alabama 35211
Counsel for Appellee

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NOTE: The following portions of the Appellants' Jurisdictional Statement are not included in Appellees Brief In Opposition pursuant to Supreme Court Rule 34.2 but are included by reference:

Questions Presented

List of Parties

Opinions Below

Jurisdiction

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TABLE OF AUTHORITIES

In Addition to the Cases, Constitutional Provisions, and Statutes listed in Appellants' Jurisdictional Statement, Appellees offer the following cases to the authorities listed:

City of Montgomery v. Robinson, 441 So. 2d 857 (Ala. Civ. App. 1983) 24

Ex Parte Terry, 494 So. 2d 628 (Ala. 1986) 26

Howard v. Pike, 275 So. 2d 645, 270 Ala. 213 (1973) 24

Strickland v. Osborn, 333 So. 2d 582, 584 (Ala. App. 1976) 26

STATEMENT OF THE CASE/FACTS

There are several inaccuracies and omissions in Appellants' statement as well as some additional information that Appellants supply which appears to add testimony that is not in the record. These problems may be due to the fact that the able and distinguished attorneys for the Appellants on appeal were not the trial attorneys in this case at the Family Court level.

Appellees offer the following Statement of the Case and Statement of Facts to give to the Court a complete picture of the complex and unfortunate factual and procedural situation in this case pursuant to Supreme Court Rule 34.2:

STATEMENT OF THE CASE

The Appellants' Statement of the Case is not correct with respect to the lack of pleadings or notice to the parents regard-

ing the Intervenors request for custody and the allegation of the child's dependency.

In addition to the Motion to Intervene filed on December 18, 1985 (C.R. 11) the Baileys filed a separate petition for custody of Joe Brown on December 20, 1985. This petition was erroneously assigned a separate case number, JU-85 53148, and was personally served on the parties during the hearing on December 20, 1985. The Court's record for this case was forwarded from the Family Court clerk's office to the Court of Civil Appeals. Counsel Roger Appell and the parents, Tom and Debra Brown, examined the petition, and the petition was discussed as an integral part of the motion to intervene by the Baileys (R. 4-10). Specific references to the custody petition were also made on R. 7, R. 89, and R. 90.

Another error exists in that the

Appellants also state that the Brown's parental rights have been terminated; however, this is not the case and the termination statutes are not applicable in this action. Custody determinations in CHINS and dependency cases are not always termination of parental rights cases. Termination of parental rights cases place the child with the state or with adoptive parents.

The Trial Court did not terminate the Browns' parental rights. The court's order of January 13, 1986 specifically directed that the entire family resume counseling in an attempt to solve their family problems. The Baileys were awarded custody; however, the Browns have rights and obligations with respect to Joe Brown, just as divorced, non-custodial parents have to their children. There is a clear distinction in Alabama law between custody determinations and the termination of par-

ental rights, and in this case the award of custody to the Baileys did not terminate the Browns' parental rights and obligations. The Browns have the residual parental rights and responsibilities as defined in Alabama Cose 12-15-1(22).

STATEMENT OF FACTS

The "facts" in Appellants' brief appear to be the parents' rationalized view of the unfortunate circumstances that prefaced this action, and must be restated to properly reflect the situation before the Trial Court in Joe Brown's case. A careful reading of the transcript reveals a far different picture of the Browns' family situation and relationship with their son Joe that the one presented in Appellants' statement.

On or about July 13, 1985, Tom Brown disciplined his thirteen-year-old son,

Ben, with a beating (R. 74). The previous day he had slapped his fourteen-year-old son, Jason, in the face (R. 663). On July 15, 1985, he approached his sixteen-year-old son, Joe, with raised fist and began hitting him (R. 75). Tom had his son Joe in a headlock and hit him in the face three times (R. 77). Tom outweighs his oldest son by at least fifty pounds (R. 605).

Joe went to his friends', the Baileys, home, where the Baileys' college-aged daughter saw "all the blood on his shirt, and his face beat up" (R. 434). Dr. Don Wendorf, a licensed psychologist who had been treating Tom and his wife, Debra Brown, for more than a year prior to the court proceedings, filed an abuse report with the Department of Pensions and Security after learning of the July 15th incident (R. 45, 52).

Joe began living with the Baileys on the 15th of July, 1985. The Baileys pro-

vided all of his moral and monetary support until December 2nd (R. 169). Tom Brown knew his son was staying with the Baileys and gave his son permission to stay there (R. 537). Mr. Brown never contacted the Baileys about his son staying there, and he never offered any support during the five months that his son was with them (R. 119). Furthermore, he refused to pay a medical bill that his son sent him (R. 457).

To give a complete picture of the incidents leading to the Trial Court's decision, a history of the Brown family is necessary.

When Tom Brown was a freshman at the University of Alabama, he married his seventeen-year-old girlfriend, Mary Dobbs, who was pregnant (R. 487). Tom's first marriage ended in divorce in 1969 after less than one year (R. 488), and Mary Dobbs was awarded custody of the infant child, Joe. In 1970, Tom Brown took custody of

Joe, and married Mary Lou Hipp (R. 490). Ms. Hipp had a son by a previous marriage, Lonnie, and Tom later adopted Lonnie (R. 490). Two children, Ben and Eric, were born of this marriage to Mary Lou Hipp (R. 569).

Tom and Mary Lou were divorced in 1976, and later in the year, remarried (R. 494-495). However, in 1978 they were again divorced (R. 495). In the 1978 divorce, Mary Lou obtained custody of all four children, including Joe, who was not her child (R. 495). However, Tom Brown later received custody of all four children, including Lonnie, who was not his biological child (R. 496). Later, Lonnie returned to the custody of his natural mother (R. 499-500).

Only a few months passed between Tom's second divorce of Mary Lou and his first marriage to Debra (R. 314). Tom Brown was twenty-eight years of age, and

the October 14th marriage to Debra was his fourth marriage. Their 1978 marriage was at least Debra's third marriage, and she had a son, Jason, by one of her previous husbands (R. 569). Debra also adopted Joe (C.R. 025).

Tom's marriage to Debra has not been a tranquil one. For at least a year and a half prior to the proceedings, Tom and Debra had been receiving treatment from counselors (R. 356). They first received treatment from a female family counselor, and then in December of 1984, with a psychologist, Dr. Don Wendorf (R. 11). Tom and Debra fought often and at times became physically violent (R. 265).

One evening in November 1984, Tom Brown waited up for Debra while the children were in bed. When she came in, Tom started shaking her and pushing her against a wall. At that time, she called for Joe to come in

and help (R. 304). When Joe responded to the call for help, his mother said that Tom had been banging her head into a wall and had ripped her clothes (R. 304).

Another incident occurred in late 1984 when the police went to the Brown home in response to an altercation between Tom and Debra (R. 315). Debra had come to the house one night and found Tom with another woman (R. 351). Tom and Debra had, at this time, been divorced for approximately one month (R. 350). Tom had his son Ben call the police because Debra was beating him up because there was another woman there. The "other woman" stayed the entire night (R. 352), and the children, who ranged in age from seven to fourteen years, were present in the home (R. 590).

When Tom and Debra divorced in 1984, Tom told Joe it was because Debra had been cheating on him with another man (R. 590). While Tom and Debra were divorced and Debra

was not living in the house, Tom stayed out all night on more than one occasion and left the boys, who ranged in age from seven to fourteen years, at home alone (R. 305).

When Tom and Debra remarried in late 1984 or early 1985, it was his fifth marriage, and at least her fourth. Tom was thirty-three years old at the time.

As stated previously, physical confrontations were not only those between Tom and Debra, but included severe physical discipline of the children. Tom's actions toward Joe on July 15, 1985 precipitated an abuse petition being filed with the Alabama Department of Pensions and Security. Dr. Wendorf suspected not only physical abuse, but that Tom was emotionally abusive toward his children as well (R. 45). Tom's actions toward his wife and children may be partially explained, but certainly not excused, by the fact that he was probably physically and emotionally

abused by his own father (R. 44).

Testimony revealed an incident where Ben, immediately after being alone with his father Tom, exited the room with two black eyes and a bloody nose (R. 299). At that time, Tom took Ben from the den, through the house, to the child's bedroom prior to hitting him. Tom's striking of Ben was not an impassioned reaction, but to the contrary, he said he had time to think about what he was doing (R. 594). Debra testified that one day before the discipline incident with Ben, Tom was slapping Jason (R. 663). The children complained to Debra about being hit (R. 665), but she hit the children in the face as well (R. 264, 668).

Tom and Debra also kept controlled substanced in .their home when Joe was living there (R. 305). They kept marijuana in a German beer stein in the den and marijuana seed upstairs in their bedroom (R.

305). There was also pot (marijuana) in ashtrays in the den (R. 306). Tom also rolled marijuana in front of Joe (R. 306, 460) and smoked marijuana in his house with the children there (R. 585). The Browns also acknowledged having Quaaludes in the refrigerator (R. 306, 307). The Quaaludes were explained as belonging to the parents' friend and not to the Browns and that Tom's friend's wife put them there (R. 343). Tom also admitted that he had, in the past, grown marijuana on his father's land (R. 586).

In addition to the evidence about the physical and emotional abuse, as well as the drugs, very revealing testimony was elicited in regard to their son Eric's birthday. Tom testified that Eric's birthday was October 14, 1977 (R. 569). However, Tom and Debra instructed the children to celebrate Eric's birthday on October 1 each year after he was enrolled

in school (R. 573). Tom also testified that either he or Debra enrolled Eric in school (R. 574). However, the child was enrolled pursuant to an altered birth certificate with a birthday of October 1. When Tom was asked: "Wasn't the child enrolled pursuant to the October 1 birthday that was given to the Board of Education," he refused to answer on the grounds that it might tend to incriminate him (R. 574). Tom was asked if he submitted an altered birth certificate to the Board of Education. He again responded by refusing to answer on the grounds that it might incriminate him (R. 573). Tom Brown also pled the Fifth Amendment when asked if he supplied an altered birth certificate to a medical doctor.

The preceding has been an overview of events prior to Joe leaving his father's house. What occurred after he left is just as enlightening.

After being beaten by his father to the extent that he had a lump on his head, was bleeding, had headaches and was sick to his stomach, he moved in with the Baileys on July 15, 1985. Mr. and Mrs. Bailey were out of town when Joe got to their home, but he called them and obtained permission from them to stay (R. 159, 415). After Joe left his house that afternoon, Tom, by his own admission, made no attempt to find his son (R. 581). Within two days, the Homewood police chief located Joe at the home of Richard Bailey, Joe's best friend (R. 542).

Tom Brown gave Joe permission to stay with the Baileys (R. 537). In fact, when Joe went to get his clothes, his father was sitting on the bed next to the child's packed clothes, reading a newspaper (R. 310-311). He did not ask his son to stay (R. 311), and told him not to come back after 6:00 that evening (R. 376).

Tom and Debra had no further contact with Joe until August, when Joe went to Tom's office to see his father regarding a permission slip to play football (R. 431-432). Tom denied the request for Joe to play football. In October, Joe received, at the Baileys' home, a copy of a letter Tom sent refusing to pay a medical bill incurred by Joe (R. 547, 611). There was no personal contact by Tom and Debra with Joe from August until late November.

In November Tom and Debra drew up a list of "conditions of return and continued residence" for Joe's return to their home. The conditions included requirements that Joe completely sever all ties with his paternal grandparents, his girlfriend and the Baileys (C.R. 044). The conditions also required Joe to do chores "cheerfully" and always maintain certain grades. The conditions also required him to:

> Perform all the major weekend chores, such as painting, leaf raking, lawn mowing, house cleaning, washing, waxing and cleaning automobiles, without the assistance of brothers for the same period of time as your absence from home (R. 44).

When these conditions were given to Joe, he had been gone for approximately four months.

Further, when this list was presented to Joe, it had a notation, "This offer expires at 12:01 a.m., November 28, 1985" (C.R. 045), as well as "Understood and agreed to," with a signature line. Joe declined his father's non-negotiable offer.

Tom and Debra's requirement that Joe completely sever his relationship with his girlfriend, Leigh Fleck, seemed extremely harsh. While Joe was living with the Baileys, Tom and Debra went through the things Joe did not take with him. They read many

notes from Leigh to Joe, as well as Joe's diary (R. 555). After going through his things, they discovered Joe and Leigh had been having sexual relations. Tom and Debra testified they were unhappy that their son was having sexual relations. Their attorney grilled Leigh extensively on how many times a day and how many days a week she and Joe had sexual relations.

The Browns' alleged disapproval of the premarital sex seems quite inconsistent with their actions. Tom put prophylactics in Joe's Christmas stocking as early as Christmas of 1984 (R. 595) and told Joe if he got a girl pregnant, "it would not be his (Joe's) responsibility" (R. 361).

Tom and Debra had forbidden Joe to communicate with his brothers. However, Joe did telephone his parents' home in an attempt to talk with Ben. Tom, without Joe's knowledge, listened to their conversation on an extension (R. 562-564). It

was only after Joe attempted to talk with his brothers that the CHINS petition was filed in Family Court (R. 564).

Joe had one face-to-face contact with his father from July to December, and that was the one initiated by Joe at his father's office regarding football (R. 431-432). Joe next saw his parents in the Family Court of Jefferson County pursuant to a runaway petition and pickup order.

Police were sent to the Baileys' home to pick up Joe (R. 484), and Joe was held at the Jefferson County Family Court for two days. A detention hearing was held to decide where Joe would be placed until the hearing (C.R. 005). A number of non-institutional alternatives were offered, including the Baileys' home and the homes of two different clergymen, but Tom and Debra wanted him in an institutional setting; therefore, he was placed in the Salvation Army Youth Emergency Service (hereinafter

"Y.E.S.") (C.R. 005).

Tom and Debra visited Joe, at the request of the counselor at the Y.E.S program, twice while he was there.

Trial was begun on December 20th before the Honorable Sandra Ross. As the trial was not completed prior to the Christmas break, Judge Ross placed the child with the Baileys during the recess to avoid the child having to remain in an institution during the Christmas holidays (R. 150). Tom and Debra strenuously objected and requested that the child remain in the institution over the holidays (R. 152).

Tom and Debra did not contact Joe during the Christmas and New Year holidays (R. 613). He received no calls, no presents, and not even a card from Tom and Debra (R. 613). Meanwhile, Tom and Debra enjoyed a ski vacation in the mountains (R. 613).

Probation Services conducted an in-

vestigation of the Baileys' home and found that it met all "ideal and written requirements for a DYS foster home" (R. 700, C.R. 013).

After approximately forty-three hours of testimony, Judge Ross found Joe to be both a CHINS as well as a dependent child (C.R. 007, 008). She also ordered that the Department of Pensions and Security investigate the home of Tom and Debra Brown as to the well-being of the remaining children in the home (C.R. 008).

There are other inconsistencies between Appellants' "facts" and real life. Tom and Debra Brown, "loving parents," have not complied with the Court's order for continued counseling regarding the problems with Joe (S.R. 136). Tom Brown withdrew over $1,000 from his son's account that was designated for Joe's use for his education, without consulting with Joe or explaining his actions to Joe (S.R.

101). During the period that Joe began seeing Leigh Fleck, with all of the problems delineated by the Browns that came with the relationship, Tom and Debra were in significant marital conflict, and Tom admitted that he was "in emotional turmoil at that time" (R. 600). These inconsistencies were not indicative of the loving and concerned home portrayed by Appellants in their statement.

The record shows that the Browns have the ability to pay for the support of their child. The record shows that the child needs financial support, despite the prior assumption of all support obligations by the Intervenors. The real facts are that no support was provided for Joe Brown by Tom and Debra until after the court's ruling on the support issue. Nothing was offered or paid by Tom and Debra from July through the support hearing for Joe Brown's benefit (S.R. 39).

There are many other conflicting points in the Appellants' version of the facts; however, the record adequately shows that there was emotional and physical abuse of Joe Brown and very inconsistent behavior by Joe's father throughout his life, especially in the period prior to Joe's leaving home in July 1985.

APPELLEES ARGUMENT IN OPPOSITION TO APPELLANTS' REQUEST FOR SUPREME COURT REVIEW OF THIS APPEAL

Appellees contend that the constitutionality questions and challenges raised by the Appellants (Parents) are invalid for the following reasons:

1. The issues of vague and overbroad statutory construction were not made in a timely manner at the trial level.

2. This case was not a termination of parental rights case, but the case was instead a CHINS/dependency case which was decided by the Trial Court under the appro-

priate standards and statutes.

3. There are no special or important reasons present in this case to warrant an attack on the Alabama statutory scheme for dealing with CHINS/DEPENDENT children. The parents instituted this action by petition, invoked the jurisdiction of the Family Court, were given notice of the intervention and the dependency allegations, and tried the case by presenting evidence to the Trial Court; therefore, it is inconsistent for the parents to now claim that they were denied due process of law by the statutes and the court that they chose to use in this family relations case.

SPECIFIC ARGUMENTS

I. THE PARENTS WERE NOT DENIED DUE PROCESS AND THE ALABAMA DEPENDENCY STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The parents claim in their statement

that dependency was not before the court; however, the Baileys offered a petition alleging dependency as described above in the Statement of the Case. The parents were not unable to challenge the constitutionality of the statute, they simply did not make a challenge until the appeal process began. There was no adverse constitutional ruling by the Trial Court which could be challenged on constitutional grounds by the parents. The case law supports the Appellees' contention that constitutional questions cannot be considered for the first time on appeal. City of Montgomery v. Robinson, 441 So. 2d 857 (Ala. Civ. App. 1983); Howard v. Pike, 275 So. 2d 645, 270 Ala. 213 (1973).

The cases cited by the Appellants in support of their due process arguments involve termination of parental rights, and this case involved a temporary custody change with a Trial Court order to resume

counseling/contact to perhaps effect a reconciliation; therefore, Appellants reliance on these termination cases is misplaced.

II. THE APPELLANTS AGAIN CONTEND THAT THIS IS A TERMINATION OF PARENTAL RIGHTS CASE; HOWEVER, THIS CASE IS FACTUALLY AND STATUTORILY DISTINGUISHED FROM A TERMINATION CASE.

As the previous courts have noted, this case cannot be characterized as a termination of parental rights case. The standards, burdens, parties, and the statutes involved in termination cases differ from the CHINS and/or dependency cases.

The parents initially and voluntarily filed this action under the jurisdiction of the Family Court. While the Family Court must weigh the substantial private interests of the parents, this trial court must make its decisions based on the best interests of the child. As stated in a

1976 Alabama case, the primary objective of a court in a custody case is to make a determination of the best interests of the child, and this rule of law prevents slavish adherence to the principle that if the natural parent is fit, that parent received custody of the child. Strickland vs. Osborn, 333 So. 2d 582, 584 (Ala. App. 1976). There is no constitutional right for the parents to abuse a child mentally and/or physically, and many factors must be evaluated by the trier of fact under the present Alabama statutes prior to reaching a custody determination.

The Appellees contend that the Alabama laws currently provide adequate constitutional safeguards to allow the lower courts to properly decide custody issues without the necessity of finding parental unfitness when the best interests of the child indicate a need for a temporary change of custody under the facts

before the court. The vital interests of the parents must be tempered by the rights of and the protection of the child.

III. THE ALABAMA STATUTORY SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION WHERE THE STATUTES DISTINGUIGH BETWEEN THE STANDARDS INVOVLED IN A CHANGE IN CUSTODY PURSUANT TO A CHINS/ DEPENDENCY FINDING AND THE STANDARDS REQUIRED IN TERMINATION OF PARENTAL RIGHTS CASES.

The statutes and case law in Alabama have established differing standards, burdens, and requirements for these custody cases because the rulings of the courts have differing effects on the parties. The Appellants' reliance on Ex Parte Terry, 494 So. 2d 628 (Ala. 1986) is misplaced since the instant case was not a termination of parental rights case, and to characterize it as such is erroneous espe-

cially in light of the fact that the Trial Court ordered the child and the parents to continue counseling with the hope of reconciliation at a later date.

Differing standards, burdens, and tests for various types of cases are required to meet each particular factual situation and type of petition that is brought before the Family Court; therefore, such differences in the Alabama law do not violate the equal protection safeguards.

IV. SECTION 12-15-71 OF THE CODE OF ALABAMA (1975) IS NOT UNCONSTITUTIONAL FOR THE REASONS OFFERED BY THE APPELLANTS.

The parents present the distinction between the least restrictive alternative and the most restrictive alternative as dispositional options or standards that the Family Court should use in CHINS and dependency cases involving custody changes. This distinction, standard, or

test that is advocated by the Appellants is not founded in the case law or in any provision of the Alabama statutes and is an incorrect analysis of the manner in which these statutes are applied to particular cases by the Family Court. The test in custody cases is, as always, to determine what alternative is in the child's best interest, and the Family Court is not required to use the least restrictive alternative vs. the most restrictive alternative procedure in reaching a decision on child custody especially when no termination of parental rights is involved.

This section of Alabama Juvenile Proceedings statutes is not unconstitutional.

V. THE TRIAL COURT'S ORDER DID NOT VIOLATE APPELLANTS' DUE PROCESS RIGHTS.

As the lengthy factual summary indicates, the Trial Court had a tremendous

amount of evidence to evaluate in arriving at a decision on the custody of this child. The parents continually stress their rights to custody and control of their child; however, they ignore the balancing aspect of the the Trial Court's decision-making in protecting the parents' rights versus the rights of a child with obvious problems at home and ample evidence of emotional and physical abuse. The Family Court is not required to make specific factual determinations as to the disposition of CHINS and dependency custody cases. The Alabama statutes offered clear guidance for the Trial Court as to its options in this case which was initiated by the parents pursuant to the provisions in Title 12 of the Code of Alabama (1975). These parents now seek to have the same statutes declared unconstitutional. Appellees contend that the statutes are constitutional and were properly applied

in this case.

VI. THE PARENTS WERE NOT DENIED PROCEDURAL DUE PROCESS THROUGH THE HOLDING OF DEPENDENCY BECAUSE THE DEPENDENCY WAS ALLEGED AND THE PARENTS HAD ADEQUATE NOTICE OF THE ALLEGATION.

This portion of the parents' argument is factually and legally incorrect. The circumstances surrounding the motion to intervene and the subsequent petition for custody with its dependency allegation are brought out in the Statement of the Case above. The parents had notice of the issues to be tried, and in fact they had the Christmas holiday break between the filing of the Baileys' custody petition in the initial hearings and the trial of the case during which time they had ample opportunity to prepare their case for trial.

CONCLUSION

The constitutional questions presented here were not raised at trial, the Alabama statutes are clear and concise on these issues, and the lower courts properly applied these statutes; therefore, the Appellees request that the Supreme Court deny the review of this appeal.

Respectfully submitted,

Annetta Z. Arnold
(Counsel of Record)

H. Evans Whaley
Vincent, Hasty, Arnold,
Whaley, P.C.
90 Bagby Drive
Suite 200
Birmingham, AL 35209
(205) 942-7649

J. Wynell Brooks
Public Defender
120 Second Court North
Birmingham, Alabama 35211

CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Brief In Opposition on all aprties requiring to have been served, by mailing the same to the Honorable L. Drew Redden, Redden, Mills & Clark, 940 First Alabama Bank Building, Birmingham, Alabama 35203, properly addressed and with sufficient first class postage prepaid, this the 7th day of August 1987.

Annetta Z. Arnold
Of Counsel for Appellees